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No. 05-1506

Supreme Court, U.S.
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In The

Supreme Court of the United States

JERRY LEE CARTER,

Petitioner,

v.

TOBY BOWMAN and
COMMUNICATIONS SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID J. MIDDLEBROOKS
Counsel of Record
for Respondents
SALLY BROATCH WAUDBY
LEHR MIDDLEBROOKS &
VREELAND, P.C.
P.O. Box 11945
Birmingham, AL 35202-1945
(205) 326-3002

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether Petitioner has presented any compelling reasons to grant the Petition where the Eleventh Circuit's opinion affirming summary judgment in favor of Respondents does not conflict with any decisions of this Court and does not implicate an important federal question that has not previously been decided?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Communications Services, Inc. does not have a parent company and is not publicly traded.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
CONCLUSION	6

TABLE OF AUTHORITIES

Page

Ash, et al. v. Tyson Foods, Inc., 126 S.Ct. 1195 (2006) 4

Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) 3

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 5

Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) 4, 5

Hoag v. Arkansas State Highway Transp. Dept., Slip Copy, 2006 WL 113581 (8th Cir. 2006) 5

INTRODUCTION

Petitioner is required to present "compelling reasons" to justify the granting of his Petition for Writ of Certiorari. *See* Sup. Ct. Rule 10. Petitioner has failed to present any compelling reasons for issuance of the writ. Furthermore, his arguments in support of granting the writ are based upon misstatements of the record, the applicable law, and the decision below. (*See* Pet. Cert. at 5-6.) The Eleventh Circuit's opinion at issue neither conflicts with any decisions of this Court, or of any other Court of Appeal, on any important issue; nor decides or implicates any previously undecided important point of law. *See* Sup. Ct. Rule 10(a)-(c).

STATEMENT OF THE CASE

Petitioner Carter was hired by Respondent Communications Services, Inc. ("CSI") in December 2002. (Pet. App. at A2.) When Carter applied for employment with CSI, he received a copy of CSI's Substance Abuse Policy which requires drug testing for employees involved in Worker's Compensation injuries requiring medical treatment. (Pet. App. at A12.) The policy further provides, and Carter signed an acknowledgement that, employees refusing to take the alcohol/drug test, **or who fail to cooperate or participate in these procedures**, will be subject to discipline up to and including termination. (Pet. App. at A12.)

On July 31, 2003, Carter claims he was struck by lightning while he was working with another CSI employee, David Gomez. (Pet. App. at A13.) Gomez allowed Carter to use his CSI business phone to contact family

members and his supervisor, Respondent Toby Bowman. (Pet. App. at A13.) Despite having access to the telephone, Carter did not call 911. (Pet. App. at A13.)

When Bowman learned that Carter claimed to have been struck by lightning, because it was a work-related injury, he arranged to have Carter transported to a nearby occupational health clinic for medical treatment. (Pet. App. at A2.) As the paperwork was being completed, Carter was notified that he was required to take a drug test as part of the Worker's Compensation claim. (Pet. App. at A2.) Carter did not cooperate by submitting to the drug test and instead insisted he be taken to a hospital emergency room. (Pet. App. at A2.) Carter was informed that refusing the drug test was jeopardizing his employment. (Pet. App. at A2.) Nonetheless, Carter continued in his refusal and/or failure to cooperate in submitting to the drug test and left the facility without submitting to the test. (Pet. App. at A2.) Although Carter disputes that he "refused" to take the drug test, he never submitted any evidence showing that he submitted to a drug test. (Pet. App. at A5-6.)

The following day, Carter was informed that his employment was terminated because he failed and/or refused to cooperate in taking the drug test in violation of Respondent's Substance Abuse policy. (Pet. App. at A2.) Notably, although Bowman notified Carter that his employment was terminated, the **decision** to terminate Carter's employment was made by Bowman's supervisor, Marty Whitener. Doc. 57, Ex. 2, Whitener Supp. Aff. at 8.

Carter failed to present any evidence that any other employee of CSI ever refused to take a drug test. (Pet. App. at A16.) He further failed to present any evidence

that the reason given by CSI for his termination was a pretext for race discrimination. (Pet. App. at A5-6.)

REASONS FOR DENYING THE PETITION

This is a simple case where an employee was terminated, pursuant to a policy of which he had notice, due to his refusal and/or failure to submit to a drug test after an alleged worker's compensation injury. Petitioner claims that the termination of his employment was the product of race discrimination rather than his failure to submit to a drug test. The undisputed facts show that Petitioner left the medical facility to which he was taken for treatment without submitting to a drug test, and he failed to present any evidence that he ever submitted to a drug test.

The Eleventh Circuit affirmed summary judgment in Respondents' favor because Petitioner failed to establish that the reason articulated by Respondent CSI for Petitioner's termination was a pretext for race discrimination. (Pet. App. at A5-6.)[1] The Court of Appeals also refused to consider Petitioner's argument that he had established direct evidence of discrimination because Petitioner had failed to make that argument before the District Court. (Pet. App. at A5-6.)

Petitioner wrongly asserts that Certiorari review is warranted because the Eleventh Circuit's decision below

[1] The judgment in favor of Respondent Bowman should not be disturbed because there is no individual liability under Title VII. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

conflicts with three decisions of this Court. There are no such conflicts.

1. Petitioner first argues that the Eleventh Circuit's decision in this case conflicts with this Court's decision in *Ash, et al. v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006). (*See* Pet. Cert. at 5-6.) There is no conflict between these decisions. In *Ash*, the Court of Appeals' holding that the term "boy" alone was not evidence of racial animus was reversed. 126 S.Ct. at 197. This Court held that the term "boy" may, in some circumstances, constitute evidence of a discriminatory intent. *Id.* In this case, the comment at issue is alleged to have been made by Bowman, who was not the decision maker, about a month before and unrelated to Respondent's termination. (Pet. App. at A3.) The alleged comment by Bowman stated something to the effect that Petitioner's brother must be a drug dealer because he was driving a nice car. (Pet. App. at A3.) The Eleventh Circuit below did not hold that this alleged comment could not be evidence of racial animus. (Pet. App. at A5.) Rather, the Eleventh Circuit refused to consider Petitioner's argument that this comment was direct evidence of discrimination because that argument had not been raised before the District Court. (Pet. App. at A5.) *Ash* is further distinguishable because, in this case, the alleged racist comment was not made by the decision maker. Thus, rather than presenting a conflict with *Ash*, the law established in *Ash* is not even applicable to the Eleventh Circuit's decision in this case.

2. Similarly, Petitioner briefly claims that the Eleventh Circuit's decision in this case conflicts with this Court's decision in *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978). (*See* Pet. Cert. at 6.) Petitioner's argument in this regard consists solely of a recitation of one quote from

Furnco inferring discrimination from otherwise "unexplained" actions. (*See* Pet. Cert. at 6.) However, contrary to Petitioner's implication, in this case, there are no "unexplained" actions from which one could infer race discrimination. Respondent CSI explained the reason for Petitioner's termination: he refused to submit to a drug test after suffering a worker's compensation injury requiring medical treatment. The facts on which Respondent CSI based its termination decision are **undisputed**, not unexplained. (Pet. App. at A5-6.) Therefore, there is no conflict with *Furnco*.

3. Finally, Petitioner claims that the Eleventh Circuit's decision in this case conflicts with this Court's opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). (*See* Pet. Cert. at 6.) This assertion is also without merit. The issue in *Desert Palace* was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction." 539 U.S. at 98. The Court answered this question in the negative. *Id.* at 101-02. No part of the decision changed the analysis applicable to cases on summary judgment. *Id.*; *see also Hoag v. Arkansas State Highway Transp. Dept.*, Slip Copy, 2006 WL 1133581 (8th Cir. 2006). Because the Eleventh Circuit below was not addressing whether a mixed motive defense and/or instruction was appropriate in this case, *Desert Palace* has no application here. Because *Desert Palace* does not apply, there is no conflict with that decision, and any further clarification of *Desert Palace* will not affect this case.

CONCLUSION

In conclusion, Petitioner has failed to carry his burden of demonstrating that there are "compelling reasons" for this court to grant his Petition. Therefore, his Petition should be denied.

Respectfully submitted,

DAVID J. MIDDLEBROOKS
Counsel of Record
for Respondents
LEHR MIDDLEBROOKS &
VREELAND, P.C.
P.O. Box 11945
Birmingham, AL 35202-1945
(205) 326-3002